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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

10 TIM KENNEDY, et. al.,

11 Plaintiff,

12 v.

13 AJVS, INC., a Delaware Corporation, et.
14 al,

15 Defendants.

CASE NO. C11-1231 MJP

ORDER GRANTING
DEFENDANT'S MOTION TO
DISMISS FOR FAILURE TO JOIN
INDISPENSABLE PARTIES

16 This matter comes before the Court on Defendant's motion to dismiss for failure to join
17 indispensable parties (Dkt. No. 70), Defendant's motion to stay (Dkt. No. 74), and Plaintiff's
18 motion to strike (Dkt. No. 87). Having reviewed the motions, the responses (Dkt. Nos. 76 and
19 81), the replies (Dkt. Nos. 83 and 85), and all related filings, the Court GRANTS Defendant's
20 motion to dismiss, GRANTS Plaintiff's motion to strike, and DENIES Defendant's motion to
21 stay as moot.

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Background

The complaint in this action relates to a vessel, F/V Atlantic Frost, official number 202733 (“the Atlantic Frost”) and the maritime contracts establishing its ownership, financing, and charter for the purposes of fish processing and marketing operations. In brief, two members (Tim Kennedy, Walter Raber) of two closely-held partnerships that owned and operated the Atlantic Frost, along with a couple other creditor Plaintiffs, are suing a third, now-deceased member (William D. Phillips) for breach of LLC operating agreements, fraud, and conversion.

In 2004, William D. Phillips, Sr. (“Phillips”), Tim Kennedy (“Kennedy”), and W. Walter Raber (“Raber”), organized as AFH LLC, jointly purchased the Atlantic Frost. (Compl. ¶ 4.8.) A separate partnership, the AFS LLC, managed and operated the Atlantic Frost as a fish and crab processing vessel under a Time Charter Agreement. (Id. ¶ 4.3.) AFS LLC’s membership consisted of the same three partners as AFH LLC (Phillips, Kennedy, and Raber) with the addition of the Global Fish U.S., Inc. (Id.) Upon Raber’s death, Phillips became the President of both AFS LLC and AFH LLC. (Id. ¶ 4.17.)

In August 2010, Phillips died in a plane crash. In July 2011, Plaintiffs filed suit against Janet K. Phillips as the Personal Representative of Phillips’s Estate (hereinafter referred to as the “Phillips Estate”), AJVS Inc., and AFS LLC. Plaintiffs’ claims largely mirror counterclaims made against the Phillips Estate in a related litigation filed one month earlier before the Delaware Chancery Court (hereinafter referred to as “Delaware action”). (Dkt. No. 72, Bersch Decl., Ex. 4.) The Delaware action was filed by the Phillips Estate and includes many of the Plaintiffs in this action (Kennedy, the Raber Estate, the Raber Marital Trust and AFH LLC). Plaintiffs allegations are generally two-fold: (1) that Phillips misappropriated the assets of both AFH LLC and AFS LLC by diverting accounts payables to his own corporation, Defendant

1 AJVS, Inc. (“AJVS”) and to his own personal account; and (2) that, under Phillips’s
2 management, AFS LLC failed to pay wages to the Atlantic Frost’s captain, Ryan Raber
3 (“Ryan”), who was Raber’s son, and incurred obligations to several companies/vessels, including
4 the New England Fish Company LLC, the AJ Group LLC, and the owners of the F/V Providian
5 (Ocean Spray Partnership and Trident Maritime Company). (Compl. ¶¶ 4.30-4.97, 5.1.)

6 **Analysis**

7 I. Motion to Dismiss for Failure to Join Indispensable Party

8 Defendant AJVS Inc. seeks to dismiss for failure to join an indispensable party under
9 Rule 12(b)(7) and 19(a) or, alternatively, for failure to state a claim under Rule 12(b)(6). The
10 Court dismiss for failure to join the Phillips Estate and, therefore, does not reach the 12(b)(6)
11 motion.

12 A. Indispensable Party

13 Defendant seeks to dismiss for failure to join the Phillips Estate pursuant to Rule
14 12(b)(7). A motion to dismiss under Rule 12(b)(7) requires the court conduct three successive
15 inquiries. U.S. v. Bowen, 172 F.3d 682, 688 (9th Cir. 1999). First, the court must determine
16 whether the absent party is “necessary.” Id. Second, if the absent party is “necessary,” the court
17 considers whether joinder is “feasible.” Finally, if joinder is not feasible, the court reaches the
18 third step and determines whether the case can proceed without the absentee or whether “in
19 equity and good conscience” the action should be dismissed. Fed. R. Civ. P. 19(b).

20 i. Necessary

21 Defendant argues the Phillips Estate, Global Fish Inc., the Raber Estate and a
22 representative of AFH LLC are absent but necessary parties to this action. The Court agrees the
23 Phillips Estate is an indispensable party and, therefore, does not reach the other absent parties.

1 a. Phillips Estate

2 AJVS argues the Phillips Estate is a necessary party to the litigation because all of
3 Plaintiffs' claims relate to Phillips's mismanagement and self-dealing. The Court agrees.

4 Under Rule 19, a party is "necessary" if: (1) in the person's absence complete relief
5 cannot be accorded among the existing parties, or (2) the person claims an interest relating to the
6 subject of the action and is so situated that the disposition of the action in the person's absence
7 may, as a practical matter, impair or impede the person's ability to protect that interest or leave
8 any of the persons already parties subject to a substantial risk of incurring double, multiple, or
9 otherwise inconsistent obligations by reason of the claimed interest. Fed. R. Civ. P. 19(a).

10 Here, the Phillips Estate is a "necessary" party based on the second prong—because the
11 Phillips Estate's ability to protect its interest would be impaired or impeded by the litigation.
12 Plaintiffs' claims are essentially that Phillips misappropriated assets of AFH LLC and AFS LLC
13 and diverted them to his own corporation, i.e., AJVS. Plaintiffs' claims almost completely
14 overlap with counterclaims the Phillips Estate currently faces in the Delaware litigation. As in
15 the Delaware litigation, it is only Phillips's conduct that gives rise to liability, even if AJVS's
16 accounts also benefitted from the alleged misdeeds. Therefore, as a practical matter, there is no
17 way for Plaintiffs to prevail in this litigation without a finding the damages were a result of
18 Phillips's conduct. Since a judgment in favor of AJVS in this action would impair the Phillips
19 Estate's ability to defend itself in the Delaware litigation, the Phillips Estate is a necessary party
20 to this action.

21 Plaintiffs nevertheless argue the Phillips Estate need not be part of the litigation because
22 (1) AJVS is liable as a joint tortfeasor and (2) Phillips was merely acting as AJVS's agent.
23 Neither argument is persuasive. First, even though AJVS is liable as a joint tortfeasor, Plaintiffs'

1 argument disregards the fact that the necessary party analysis is two-pronged. While AJVS's
2 liability as a joint tortfeasor means complete relief to Plaintiffs is possible and the Phillips Estate
3 is not a necessary party under the first prong, the Court must also consider the interests of the
4 absent party. As discussed above, given the Delaware action, the Phillips Estate's interests
5 would be impaired if absent from this litigation.

6 The on-going Delaware action, therefore, makes this case unlike the case Plaintiffs rely
7 on to argue against Rule 19 dismissal. In Huber v. Taylor, 532 F.3d 237, 242 (3rd Cir. 2008),
8 Huber, the Third Circuit held Plaintiffs suing their former attorneys need not have also sued their
9 local counsel. Id. The Third Circuit's reasoning was that, Rule 19 requirements were not
10 "satisfied simply because ... a judgment against Defendants [could] set a persuasive precedent in
11 any potential future action against Local Counsel." Id. at 249-50. However, in this case, the
12 concern is not regarding a potential future action, but an action that is already on-going and filed
13 before this one. Because the Phillips Estate is facing a counterclaim in Delaware and its interests
14 in defending that action would be implicated, the Phillips Estate is a necessary party under the
15 second prong.

16 Second, Plaintiffs' argument that Phillips acted as AJVS's agent is unavailing. Plaintiffs
17 argue it was AJVS that was the actual member of AFS LLC, and not Phillips and, therefore,
18 Phillips's conduct was done as AJVS's representative to AFS LLC's management committee.
19 This is a novel argument likely necessitated by the Court's dismissal of Phillips--and, more
20 importantly, not pled in the Complaint. In the Complaint, Plaintiffs listed Phillips as AFS LLC's
21 member, not AJVS. (Compl. ¶¶ 4.26 – 4.35.) The Complaint's only reference to AFS LLC's
22 ownership is as follows: "[t]he full extent of [Phillip's] self-dealing waste and diversion of assets
23 is unknown and perhaps unknowable in part because there are . . . inconsistent tax records. Tax
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1 records differ over whether [Phillips] or AJVS, Inc. is the owner of AFS LLC.” (Compl. ¶ 4.69.)
2 Since the parties’ disagreement over tax records hardly demonstrates Phillips acted as AJVS’s
3 agent and Plaintiff’s Complaint is drafted otherwise, the Court finds Phillips remains a necessary
4 party to this action.

5 Since the Phillips Estate’s interest will be immediately impacted given the Delaware
6 litigation, the Court finds the Phillips Estate is a necessary party to this litigation.

7 ii. Feasibility

8 At the second step of the analysis, the Court considers whether the Phillips Estate’s
9 joinder is feasible. There are three circumstances where joinder is not feasible: when venue is
10 improper, when the absentee is not subject to personal jurisdiction, and when joinder would
11 destroy subject matter jurisdiction. EEOC v. Peabody Western Coal Co., 400 F.3d 774, 780 (9th
12 Cir. 2005).

13 Here, the Phillips Estate’s joinder is not feasible because the Court already determined it
14 lacks personal jurisdiction over the Phillips Estate. (Dkt. No. 62.) Plaintiffs attempt to argue the
15 Court has specific personal jurisdiction over the Phillips Estate even though the Court
16 determined it lacked general personal jurisdiction. The Court finds the argument meritless.
17 Plaintiffs’ argument is based on an option agreement that sold AJVS from Phillips to its current
18 owners, Phoenix Professor Limited Partnership (“PPLP”). A provision in the option agreements
19 reads that Phillips and PPLP “submit to the personal jurisdiction of any court . . . in Seattle,
20 Washington, with respect to any litigation arising out of this Agreement.” However, the option
21 agreement is not the contract being litigated here. While AJVS may hypothetically have a claim
22 against its Co-Defendant, the Phillips Estate, for breach of the option agreement, AJVS has not
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1 joined the Phillips Estate to this dispute and, as currently pled, the dispute relates to breach of
2 wholly separate LLC operating agreements.

3 Since the option agreement does not relate to this litigation, the Court finds joinder of the
4 Phillips Estate is not feasible.

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6 iii. In Equity and Good Conscience

7 The third step in a Rule 19 motion is to consider whether dismissal is in equity and good
8 conscience. The decision whether to dismiss due to “equity and good conscience” is made in
9 light of pragmatic considerations. Roos v. Texas Co., 23 F.2d 171 (2d Cir. 1927). In
10 determining whether an action should be dismissed, courts consider: (1) the extent to which a
11 judgment rendered in the person’s absence might prejudice that person or the existing parties; (2)
12 the extent to which any prejudice could be lessened or avoided by protective provisions in the
13 judgment, shaping the relief; or other measures;(3) whether a judgment rendered in the person’s
14 absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the
15 action were dismissed for non-joinder. Fed. R. Civ. P. 19(b).

16 Here, three of the four factors counsel dismissal. Regardless of whether a judgment in
17 this action would adequately serve Plaintiffs, Plaintiffs also have an adequate remedy in the
18 Delaware litigation—i.e., via the counterclaim that is already pending. In addition, as discussed
19 above, a judgment in this litigation would necessarily prejudice the Phillips Estate in the
20 Delaware litigation. Since Phillips’ and AJVS’s actions were so closely intertwined, the
21 prejudice could not be lessened through protective provisions in the judgment. Considering the
22 interests of justice, the Court DISMISSES this action for failure to join the Phillips Estate, who is
23 an indispensable party not feasible subject to joinder.

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1 II. Motion to Strike

2 In surreply, Plaintiffs request the Court strike certain aspects of AJVS's reply.
3 Specifically, Plaintiffs request the Court strike (1) Defendant's reference to AJVS tax returns in
4 the reply and in initial disclosures because AJVS fails to actually attach the tax returns, (2)
5 reference to Phillips's emails with his accountant before his death because the emails speak for
6 themselves, and (3) Bratz's explanation of an IRS letter's significance because it is inaccurate.

7 The Court agrees with Plaintiffs. The Bratz Declaration includes unnecessary and
8 apparently inaccurate commentary regarding the exhibits and/or fails to attach referenced
9 documents. Therefore, the Court GRANTS Plaintiffs request and STRIKES the parts of AJVS's
10 replying on those exhibits.

11 III. Motion to Stay

12 AJVS moves to stay proceedings pending the Court's decision on its motion to dismiss
13 for failure to join indispensable parties. Since the Court has now rendered its decision on the
14 dispositive motion, AJVS's motion to stay is DENIED as moot.

15 **Conclusion**

16 The Court GRANTS Defendant's motion to dismiss for failure to join indispensable
17 parties, GRANTS Plaintiff's motion to strike, and DENIES as moot Defendant's motion to stay
18 proceedings.

19 The clerk is ordered to provide copies of this order to all counsel.

20 Dated this 15th day of May, 2012.

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22 Marsha J. Pechman
23 United States District Judge
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